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SUMMARY RECORD OF THE 39th MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

later: Ms. WONG (New Zealand)
(Vice-Chairman)

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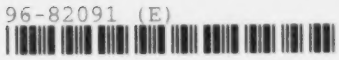

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 114: PROGRAMME PLANNING (continued)

Programme 4 (Legal affairs) of the proposed medium-term plan for the period 1998-2001 (A/C.6/51/8 and Add.1)

1. The CHAIRMAN recalled that, in a letter dated 26 September 1996 (A/C.6/51/2), the Chairman of the Fifth Committee had requested the views of the Sixth Committee on programme 4 (Legal affairs) of the proposed medium-term plan for the period 1998-2001. Following consultations with the other officers of the Committee, he had transmitted to the chairmen of the various regional groups copies of that letter and of the relevant section of the medium-term plan, requesting the regional groups to transmit their views to him by 11 November. Comments had so far been received from a number of States, namely, Austria, Belgium, Costa Rica, Cuba, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, and were reproduced in document A/C.6/51/8 and Add.1, which was before the members of the Committee. He took it that the Sixth Committee wished to transmit those comments to the Chairman of the Fifth Committee.

2. It was so decided.

AGENDA ITEM 120: HUMAN RESOURCES MANAGEMENT (continued)

Reform of the internal system of justice in the United Nations Secretariat (A/C.6/51/7)

3. The CHAIRMAN recalled that on 1 October, the Committee had concluded its consideration of the item, and had requested the representative of Ireland, Ambassador Hayes, to coordinate the Sixth Committee's communication on the subject to the Fifth Committee. Following consultations with the regional groups, the representative of Ireland had transmitted the communication contained in document A/C.6/51/7, which was before the members of the Committee. He took it that the Sixth Committee wished to transmit that document to the Chairman of the Fifth Committee.

4. It was so decided.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1 and A/51/365)

5. Ms. WONG (New Zealand), referring to chapter V of the report of the International Law Commission (A/51/10), said that the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law deserved close consideration. The expanded scope of the articles suggested that the consequences of harm could be extended to activities not involving risk; in that connection, her delegation endorsed the comment made by Sweden on behalf of the Nordic countries that it was

important not to undermine the "polluter pays" principle. The governing principle of international law in that area was Principle 2 of the Rio Declaration on Environment and Development, according to which States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

6. Until States had had an opportunity to express their views on the draft articles, it would be premature to take any other decisions on the future of the topic. Her delegation therefore encouraged the Commission to continue its work with a view to completing the first reading of the draft articles, and noted with satisfaction that the Commission had achieved results by using the working group format.

7. In the light of the recent proliferation of forums in which new treaties were being developed, the topic of environmental law should remain on the Commission's long-term programme of work, although it might be necessary to focus on manageable aspects of the topic.

8. As to the discussion of the agenda item in the Sixth Committee, which tended to be rather formalized, her delegation would support proposals to structure the debate so as to make it more action-oriented.

9. Mr. BIGGAR (Ireland), referring to chapter IV of document A/51/10, recalled that the topic of State succession had from the outset elicited a cautious response from the international community, owing to both the complexity of the topic and doubts as to its urgency.

10. His delegation welcomed the reports of the Special Rapporteur on the topic (A/CN.4/467 and A/CN.4/474) and endorsed the recommendation in paragraph 75 of document A/51/10 that the Commission and the Sixth Committee should limit their consideration to the nationality of natural persons, leaving aside, for the time being, the problem of the nationality of legal persons.

11. His delegation also endorsed the Special Rapporteur's view that the study which the Commission was to prepare must address separately the problems of nationality arising in the context of different types of territorial changes. It would be appropriate to retain the categories which the Commission had adopted for the codification of the law of succession in respect of matters other than treaties, rather than those which it had adopted for succession in respect of treaties.

12. Ireland further agreed with the Special Rapporteur that, while nationality was essentially governed by internal law, international law imposed certain restrictions on the freedom of action of States.

13. Since the conclusion of the Commission's most recent session, the Council of Europe's Commission for Democracy through Law had adopted an important declaration on State succession and its impact on the nationality of natural persons. That declaration, which emphasized the relevance to the issue of the principles of democracy, the rule of law and the protection of human rights, recognized that, in cases of State succession, the interests not only of States

but also of individuals must be taken into account, and provided that any deprivation or withdrawal of nationality or refusal to confer nationality must be subject to an effective remedy, could provide useful guidance for the Commission in its future work on the topic.

14. Mr. YÉPEZ (Venezuela), referring to chapter IV of document A/51/10, emphasized the importance of the item, which reflected the strengthening of the Commission's work in the area of State succession.

15. As to the indication in paragraph 77 of the report that the Special Rapporteur was in favour of elaborating a declaration of the General Assembly accompanied by commentaries, his delegation believed that it was premature to decide on the form which the outcome of the work might take, as the rights and obligations of States and individuals arising under the provisions to be drafted had yet to be determined.

16. His delegation endorsed the idea of dividing the future instrument into two parts, one dealing with general principles concerning nationality in all situations of State succession, and the other with rules for specific situations of State succession. Part I should include a provision enabling individuals to make use of all appropriate administrative or judicial appeals in order to obtain recognition by the States concerned of the nationality to which they felt themselves to be entitled, and stipulating that such appeals must be acted upon promptly.

17. Similarly, with regard to paragraph 86 (j) of the report, concerning the obligation to adopt all reasonable measures to enable a family to remain together or to be reunited, his delegation believed that consanguinity should be the determining factor in the acquisition of nationality. In any event, the right to a nationality was inherent in the human person and must be subject to international regulation, but without prejudice to the right of a State to determine who was entitled to its nationality.

18. The Venezuelan delegation attached priority to the topic of international liability for injurious consequences arising out of acts not prohibited by international law and commended the working group on its report. The draft articles would fill a gap in international law at a time when the risk of harm was increasing, intensifying the need for affected States and individuals to be provided with remedies.

19. As to whether the scope of the draft articles should be expanded, his delegation believed that the main thing was that the injured parties must be able to obtain compensation or other relief, regardless of whether the activity had involved a risk of causing harm. The consequences of the harm must be compensated, and the State in whose territory the harm originated must assume its responsibility, in accordance with the principle that a State was responsible for everything occurring in its territory and affecting other States. That did not rule out the civil liability of individuals. It would be useful to include a merely illustrative list in article 1, for it would then be easier to oblige States to take preventive measures with regard to the listed activities and substances. It was clear that the liability of a State would be increased if it had not taken or had violated preventive measures.

20. Chapter III of the draft articles, on compensation and other relief, contained the elements essential to documents such as the draft articles. However, an effort might be made to go a little further with respect to the obligation to negotiate by including requirements to conclude an agreement with the affected State or individuals and to make effective compensation, on the assumption that at a later stage a dispute-settlement mechanism would be provided in order to enforce the obligation.

21. The Venezuelan delegation believed that both the compensation procedures should be retained as alternative means of recourse. However, some points in articles 20 and 21 required clarification, including the way in which injured individuals could trigger the negotiations between States or participate in them. It might also be useful to include in article 22 a reference to the means by which the State of origin had notified the risk of significant transboundary harm, for that factor might affect the degree of liability.

22. His delegation welcomed the Special Rapporteur's second report on the topic of reservations to treaties. The rules on reservations contained in the existing treaties were fairly comprehensive although some difficulties still occurred. It might in fact be useful to establish a special regime for reservations to human rights treaties and to clarify the definition of the "object" of a treaty, with a view to determining the admissibility of reservations. In any event, the topic required further study, and the draft resolution proposed in the report was therefore premature.

23. Mr. BAENA SOARES (Brazil) said that, with regard to the topic of State succession and its impact on the nationality of natural and legal persons, his delegation agreed that the nationality of natural persons should be discussed separately from that of legal persons and given priority. The topic had implications for relations among States, particularly in the regions where borders had recently been redrawn, and touched on an individual right of great significance. The preparation of an authoritative text would benefit from submissions by States describing practical problems encountered, and the text must ensure that individuals were not threatened in their fundamental human right to a nationality. His delegation also agreed that the text should take the form of a declaration of the General Assembly, or perhaps separate declarations on the two categories of nationality.

24. The principles set out in paragraph 86 of the Commission's report would require further examination, and the text on the principle of non-discrimination would certainly have to be redrafted. In an age marked by the resurgence of intolerance it was imperative to prevent prejudice from playing any role whatsoever.

25. Turning to international liability for injurious consequences arising out of acts not prohibited by international law, he said that the Chairman of the Commission had been right to draw the Committee's attention to the assertion of the International Court of Justice in its advisory opinion on the legality of the threat or use of nuclear weapons that respect for the environment of other States was now part of international environmental law. It was natural that the commentaries to the draft articles should make frequent reference to the Rio Declaration on Environment and Development and to other multilateral

environmental instruments, and the obvious linkages between the present topic and the topic of the non-navigational uses of international watercourses underlined the fact that environmental issues had come to the top of the international agenda.

26. The Brazilian delegation did not share the doubts as to whether the draft articles ought to apply to activities not prohibited by international law which did in fact cause significant transboundary harm even though they did not at the relevant time involve a risk of doing so. The paramount consideration should be to deal with situations where significant harm had been caused, regardless of whether the activity giving rise to the transboundary harm involved any risk. Article 1 was sufficiently broad and need not be supplemented by a list of activities or substances. The obligations of prevention were dealt with at length in the draft articles and should perhaps be balanced by a more detailed treatment of compensation and other relief. The victims of transboundary harm should not be left to bear the entire loss and should be compensated. The two approaches envisaged in chapter III seemed adequate, although insufficient attention was given to the manifold aspects of compensation. Essential matters relating to the nature of the liability or compensation measures should be elaborated in greater detail, for they were the crux of the proposed instrument.

27. It was clear that any proposals on the topic of reservations to treaties should preserve the achievements of the three Vienna Conventions, but there was scope for clarifying and filling out the relevant provisions. There were no convincing grounds for a separate regime applicable to human rights treaties. The Commission should seek generally applicable rules on reservations to treaties, regardless of their nature or purpose. That did not rule out the elaboration of principles to eliminate the present uncertainties, as suggested in the draft resolution set out in the note to paragraph 137 of the report.

28. Ms. WILLSON (United States of America) said that the United States Government maintained its reservations about the Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It urged the Commission to take the concerns of Governments into account in the planning of its future work.

29. In seeking to fuse concepts of environmental impact assessment and liability the Commission had raised difficult issues. Moreover, existing agreements showed the need for liability regimes closely tailored to particular activities. It was not feasible or even necessarily desirable to establish a single regime for all cases, and certainly not a binding one. The future work should be focused on areas which had some chance of commanding consensus, with a view to producing a set of recommended principles for practices rather than a multilateral convention. The draft articles would obligate States to establish an environmental impact assessment process for virtually all activities which might cause significant transboundary harm and they implied State liability for all such harm. That was not acceptable to the United States. The Commission should narrow its focus and limit the topic to particularly hazardous activities. The regime should promote international cooperation and negotiation rather than impose binding obligations to assess risks and provide compensation or other relief.

30. The Commission had asked four specific questions, which her delegation wished to address. Firstly, the scope of the draft articles should not be broadened: article 1 (a) was already too broad. To impose liability (article 5) for all legal activities which involved any risks of significant transboundary harm made the proposal unmanageable; any extension of the regime was beyond contemplation. If the topic was limited to particularly hazardous activities, it might be useful to produce a merely illustrative list of such activities. An additional problem was that article 1 (a) did not define "activity"; the text would seem to apply even to legitimate economic or development policies. Furthermore, article 2 (b) defined "transboundary harm" essentially without limits; the formulation should be limited to physical and attendant economic harm.

31. Secondly, the liability regime should not be extended to address compensation and other relief with regard to States which did not take preventive measures. It was going too far to require States to provide compensation for all sorts of significant transboundary harm. It was going even further to propose State responsibility for violation of preventive measures.

32. Thirdly, with respect to the definition of "compensation or other relief" article 5 was very ambiguous, for it left open the question of precisely who or what was liable. If the draft articles were meant to be the basis of a treaty, it might be assumed that they imposed obligations only on States and not on private entities. Under customary international law States were not generally liable for transboundary harm caused by private entities. The best way to minimize such harm was to assign the costs to the person or entity causing it and not to the State. Her delegation endorsed the principle contained in article 20 that States should not discriminate in providing access to their judicial systems for those seeking relief from transboundary harm, but that did not compel States to provide such access or to provide access for individuals claiming transboundary harm identical to the access provided in respect of harm occurring in the State of origin.

33. Fourthly, both of the alternative procedures by which injured parties could seek remedies must be left open. It might sometimes be appropriate for victims to seek redress through the systems of the State of origin; in other circumstances State-to-State negotiations might be best.

34. Mr. HILGER (Germany), speaking on chapter VI of the report of the International Law Commission (A/51/10), welcomed the emerging consensus that there should be no fundamental change in the "Vienna regime" already in force. Nevertheless, the Commission should draft articles that would serve as a guide on State practice concerning reservations to treaties, accompanied, if necessary, by model clauses. The underlying question of the unity or diversity of the legal regime of reservations to treaties was not new. He was aware of the opinion held by some international lawyers that the "Vienna regime" should not apply to human rights instruments, but felt that other normative treaties should probably be regarded as equally important in view of their universal application. Bearing in mind that a satisfactory regime should balance the contradictory goals of achieving broad participation in the treaty and preserving its essence, he said that the "Vienna regime" provided for a maximum of flexibility and adaptability and was therefore applicable to all treaties,

regardless of their nature or object. The issue concerned not only evaluation of the permissibility of reservations in the light of the object and purpose of the treaty, but also preservation of the freedom of other contracting parties to agree to reservations through a mechanism of acceptances and objections. He shared the view that the right to formulate reservations was of a residual nature and thought it advisable that, when negotiating multilateral treaties, States should pay special attention to the permissibility of reservations and to the consequences of reservations where permissibility was doubtful or excluded.

35. The permissibility of reservations was now subject either to traditional monitoring by the contracting States and by courts in dispute settlement procedures or by human rights treaty monitoring bodies, which had acquired great significance at both regional and international levels. His Government, however, shared some of the criticism voiced in the Sixth Committee in 1996 concerning General Comment No. 24 of the Human Rights Committee (CCPR/C/21/Rev.1/Add.6). In his view, monitoring bodies had competence to examine the significance of reservations in so far as it was necessary for their own work. Such verification of the permissibility of reservations was a positive element. States, however, were free to form their own judgement and to decide on reactions to reservations which were deemed impermissible. In that connection, his delegation supported the conclusion reached by the Special Rapporteur that it was the exclusive responsibility of States to rectify any defect by opting to withdraw or amend the impermissible reservation or to withdraw from or refrain from becoming a party to the treaty. However, the principle whereby a State could not be regarded as a party to a treaty if its reservation was incompatible with the object and purpose of that treaty posed practical difficulties; whereas the test of incompatibility should be objective, State practice differed. The Commission should therefore clarify the uncertainty of the current regime in that respect, and he hoped that it would devote substantial time to the topic at its next session. The reports and draft resolution of the Special Rapporteur merited close attention and he looked forward to his further reports on other important issues concerning the regime of reservations to treaties, in which connection he pledged his full cooperation.

36. Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

37. Mr. LAVALLE VALDÉS (Guatemala) said that he wished to comment on the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (A/51/10, chap. V), particularly on the definition of the "risk of causing significant transboundary harm", contained in article 2 (a), which was a central element of article 1. His delegation objected to the definition because the phrase quoted could only be understood when read in conjunction with paragraph (22) of the commentary to article 1, where it was noted that the concept of risk was interpreted as "appreciation ... which a properly informed observer had or ought to have had". His delegation therefore believed that that interpretation limiting the concept of risk should be added to draft article 2 (a), especially if article 1 (b) was to be deleted.

38. However, for article 2 (a) to be fully understood, it had to be read not only in the light of paragraph (22) of the commentary to article 1, but also in the light of paragraph (3) of the commentary to article 2. In view of the

explanation in the final sentence of the latter, article 2 (a) could be improved if it was amended to read as follows: "'risk of causing significant transboundary harm' means any risk on a spectrum ranging from that which involves a high probability of causing significant harm to that which involves a low probability of causing disastrous harm".

39. His delegation doubted the usefulness of article 3. The first sentence of the article was too general as, taken literally, it could cover any activity carried out by a State. The text could be improved if the word "activities" was replaced by "activities referred to in article 1". The second sentence, up to the comma, was unnecessary as it duplicated article 4; and the remainder of the sentence was superfluous. Article 3 could therefore be totally eliminated or amended and placed in the introduction to the convention.

40. The words "all appropriate measures" appeared in article 4, whereas in article 22 (b) the term "due diligence" was used. The same expression should be used in both articles. At the end of article 4, the words "to minimize its effects" should be replaced by "to minimize and if possible eliminate its effects"; the relevant part of article 6 should be changed accordingly.

41. Article 8 should be deleted as its meaning was unclear and the corresponding commentary failed to provide clarification.

42. Mr. ŠMEJKAL (Czech Republic), referring to chapter IV of the Commission's report, on State succession and its impact on the nationality of natural and legal persons, said that, as the Czech Republic had recently had to deal with such problems, his delegation believed it highly desirable to have a clear vision of the corresponding positive international law.

43. His delegation supported the Commission's proposal to give priority to the issue of the nationality of natural persons, which had a human rights dimension; the issue of legal persons could be examined at a later stage. In a case of State succession, the nationality of natural persons should be considered from a very concrete and practical point of view. He welcomed the Commission's proposal that Member States should present their experiences, as specific cases could illustrate the effects of succession and guide the Commission's future work.

44. There was a lack of positive international law on the subject of nationality in the case of State succession because nationality was indisputably governed by national law, in the first place. When a territory changed its status, international law on nationality intervened essentially through a few basic principles, whose legal scope was relatively unclear at the current time; therein lay the interest of the Commission's work. His delegation believed that the statement of such basic principles, including non-discrimination, effectiveness, and consultation and negotiation in order to avoid statelessness, would fit well into the format suggested by the Commission.

45. His delegation noted that it was suggested that the future instrument should be divided into two parts. The first part, setting out the principles to which he had just referred, would be non-binding and reflect customary law with the corresponding legal consequences. The second part would contain specific

rules for the granting or withdrawal of nationality or the granting of the right of option, and would offer a complete range of solutions in the form of model rules.

46. As to the content of the proposals in question, particularly those set out in paragraph 86 of the Commission's report, his delegation noted that the proposals reflected the principles relating to the conduct that States should adopt with regard to the nationality of natural persons in the case of succession. It would state its position at a later stage, once the text of the draft articles was available.

47. With regard to chapter V of the Commission's report, on the international liability for injurious consequences arising out of acts not prohibited by international law, he noted that although the first reading of the draft articles on the topic had not been completed during the Commission's session, a working group had been set up to review the work already done. The Commission's further work on the complex subject would depend greatly on the choice made as to the scope of the articles. The Commission should adopt a prudent and modest approach, and exclude activities not involving risk. The issue of a State's obligations in the case of harm caused by lawful activities and that of strict liability were complex and controversial even in the narrow framework of activities involving risk, and the addition of activities not entailing any risk at all would make progress even more difficult. The very concept of an activity not entailing any risk implied that the possibility of causing harm could not be anticipated; therefore, none of the matters relating to prevention, contained in chapter II of the draft articles and also part of chapter I, would be applicable. His delegation believed that strict liability should be based on the concept of risk.

48. Turning to the topic of reservations to treaties (A/51/10, chap. VI), he said that the Special Rapporteur's second report (A/CN.4/477 and Add.1) was excellent. His delegation endorsed the Special Rapporteur's conclusions and the draft resolution proposed by him. The conclusions recommended the unity of the legal regime of reservations and the full application of the "Vienna régime" to human rights treaties. His delegation reaffirmed its position that reservations to treaties formed an integral part of the consent expressed by States.

49. Mr. AL-BAHARNA (Bahrain), referring to the topic of reservations to treaties, dealt with in chapter VI of the Commission's report, said that States would continue to assert their right to formulate reservations with respect to multilateral treaties to which they wished to become parties. No one could contest that right. It was doubtful whether so many States would have become parties to the multilateral convention adopted under the aegis of the United Nations if they had not been able to formulate reservations. The reservations regime established by the 1969 Vienna Convention on the Law of Treaties had served the international community well; however, certain clarifications and improvements were in order.

50. With regard to whether reservations should be examined from the point of view of "permissibility" or "opposability", the pragmatic approach of the Vienna Convention of 1969 should be followed. Article 2 paragraph 1 (d) of that Convention was sufficiently clear regarding the definition of a reservation.

51. Where a treaty specifically prohibited reservations by the parties, a State party should be dissuaded from using an interpretative declaration as a disguised reservation. Interpretative declarations were in no way equal to reservations; they should be clearly defined and distinguished from valid reservations formulated under the provisions of the 1969 Vienna Convention. The Commission should seek guidance from the provisions of the Convention on the Law of the Sea and other treaties containing provisions relating to both reservations and declarations.

52. The issue of reservations to human rights treaties should be treated more carefully since it was subject to unavoidable controversies. The question arose of whether a State party to a human rights treaty could be prevented from making a reservation to certain provisions of that treaty.

53. With respect to the problems of the formulation and withdrawal of reservations, acceptances and objections, his delegation agreed with the Special Rapporteur that the problems arising from the application of article 20, paragraphs 2 and 3, of the 1969 and 1986 Vienna Conventions and other developments in that regard should be included in a "guide to practice in respect of reservations".

54. Regarding the fate of reservations, acceptances and objections in the case of succession of States, such a "guide to practice" should cover problems relating to other categories of State succession, because the 1978 Vienna Convention dealt only with reservations of a newly independent State.

55. His delegation supported the trend towards the non-inclusion of a dispute settlement clause in the "guide to practice". However, it had no objection to the inclusion of dispute settlement mechanisms in the outline of the study proposed by the Special Rapporteur. It could enable the Commission to reflect on the question of the appropriateness of establishing dispute settlement mechanisms linked to the reservations regime. Moreover, his delegation supported the general outline of the study, as set out in the Special Rapporteur's second report, subject to the comments he had just made.

56. His delegation agreed in general with the ideas expressed in the draft resolution proposed by the Special Rapporteur, particularly in paragraph 8. However, the Commission did not need to adopt a draft resolution for submission to the General Assembly. Instead, the ideas and principles contained in the draft resolution should be submitted to the General Assembly in the form of recommendations or draft articles to be included in the Commission's future reports, as was usually the case.

57. Mr. SZÉNÁSI (Hungary), speaking on all chapters of the Commission's report, said his delegation supported the Commission's attempt to limit the scope of the draft Code of Crimes against the Peace and Security of Mankind to those categories of crimes whose inclusion enjoyed the widest support of Governments. He agreed with the Commission that the exclusion of certain crimes did not affect their status under international law, and supported its efforts to harmonize the draft with the views expressed in the Preparatory Committee on the Establishment of an International Criminal Court. However, there did not appear to be general support for the inclusion of the crime of aggression, and, indeed,

the Commission itself had noted the problems of defining aggression as an act committed by a State in its commentary. He agreed with the Commission's decision to retain the definition of genocide contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. He was satisfied with the definition of crimes against humanity, which was based on the notion that there was no nexus between that category of crimes and a state of war, and was especially pleased that institutionalized discrimination on racial, ethnic or religious grounds was included in that category. He welcomed the inclusion in the category of war crimes of acts committed in non-international armed conflicts, and of the use of methods or means of warfare with the intent to cause severe damage to the environment. He also welcomed the inclusion in the draft Code of crimes against United Nations and associated personnel. As to the form the draft Code should take, his delegation believed that it should be incorporated in the statute of an international criminal court, provided that doing so would not unduly delay completion of the work.

58. State responsibility was a complex topic, and important questions such as countermeasures, proportionality and dispute settlement had proved particularly problematic. The draft articles, whose eventual adoption would represent a major breakthrough in the codification and progressive development of international law therefore needed to be very thoroughly examined. His delegation agreed with the Commission that they should be transmitted to Governments for comment and observations, which should be submitted to the Secretary-General by 1 January 1998.

59. State succession and its impact on the nationality of natural and legal persons was a particularly important political and legal issue for countries in Central and Eastern Europe. He agreed with the Special Rapporteur that the Commission should continue to focus on the nationality of natural persons to begin with, while acknowledging that there were links between the impact of State succession on natural persons and its impact on legal persons. His delegation agreed with the general thrust of the recommendations of the Working Group contained in paragraphs 80 to 87 of the report, but was uneasy about the recommendation on the form the instrument might take; he did not see how a declaration of the General Assembly could consist of articles with commentaries. Careful thought had to be given to the form of the instrument, bearing in mind its main objectives.

60. The draft articles on international liability for injurious consequences arising out of acts not prohibited by international law represented a substantial advance in the work on the topic, but he did not agree that the nature of the draft articles should be residual in character, as suggested in the commentary to draft article 8. While he agreed with the principle that States should not be precluded from carrying out activities not prohibited by international law, he wished to stress that the freedom of action of States was not unlimited; in particular, there was an obligation to prevent or minimize the risk of causing significant transboundary harm, as emphasized in draft articles 3 and 4. He welcomed the inclusion of draft article 5, on liability, and commended the Commission for taking into account Principle 22 of the Declaration of the United Nations Conference on the Human Environment and Principle 13 of the Rio Declaration on Environment and Development. Draft article 17 was particularly important, with its obligation to enter into

consultations in order to prevent or minimize the risk of transboundary harm. He agreed with the general thrust of article 21, which obliged all States concerned to negotiate and take into account the factors referred to in article 22. However, he disagreed with the view expressed in the commentary to article 21 that the principle that the victim of harm should not be left to bear the entire loss, implied that compensation or other relief might not always be full. That so-called principle could be used as a pretext to victimize neighbouring States by carrying out activities which caused significant transboundary harm.

61. The Special Rapporteur on the topic of reservations to treaties had earlier put forward some very convincing views on the application of the relevant Vienna Conventions to human rights treaties, but the Hungarian delegation had unfortunately not yet had the time to consider the Special Rapporteur's second report.

62. His delegation endorsed the conclusions reached by the Commission in its examination of its procedures and working methods. A strict distinction between the codification and the progressive development of international law had proved unworkable, and the Commission had rightly chosen a pragmatic approach based on a composite idea of codification and progressive development. While the Commission should continue to focus on public international law, it should nevertheless continue to follow closely developments in private international law. The risk of fragmentation in international law and practice identified by the Commission should be counteracted by cooperating more closely with bodies with a special law-making mandate, such as the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, and institutions such as the Commission on Human Rights or the United Nations Environment Programme. More attention should also be paid to the activities of non-governmental scholarly bodies, such as the International Law Association, and the regional consultative committees, as well as to the valuable activity of bodies connected with the Council of Europe which were active in promoting the application of international law.

63. The major issues which could be usefully addressed by the Commission in the coming years were the Commission's relationship with the General Assembly and other bodies, both within and outside the United Nations system, the role of the Special Rapporteur, and the possible revision of the statute of the Commission. As to the Commission's long-term programme of work, diplomatic protection and unilateral acts of States were particularly appropriate topics for codification and progressive development, but he thought that the issue of the ownership and protection of wrecks beyond the limits of national maritime jurisdiction would be more appropriately considered in the context of the review procedures of the relevant conventions and within the framework of the International Maritime Organization.

64. Mrs. ESCARAMEIA (Portugal), commenting on all chapters of the Commission's report, said that her delegation wholeheartedly supported the inclusion of crimes against United Nations and associated personnel in the draft Code of Crimes against the Peace and Security of Mankind. As to the form the draft Code should take, it could best be incorporated in the definitions of crimes in the statute of an international criminal court, to avoid having different legal

instruments dealing with the same subject. When defining crimes in the draft statute, the Preparatory Committee on the Establishment of an International Criminal Court should consider the draft Code as one of the fundamental documents.

65. Her delegation reserved its position on the question of State responsibility. Portugal's domestic legislation provided for the criminal responsibility of legal persons, including that of the State, and there were merits in developing the concept of international criminal responsibility, but the draft articles did not include specific consequences attached to a crime as opposed to a mere wrongful act. Her delegation favoured a legal regime that would minimize differences in the possibilities of taking countermeasures, since it attached great importance to the Commission's role in the progressive development of international law.

66. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, she said that her delegation welcomed the emphasis on preventive action, in article 4 of the draft articles. It was crucial to retain article 1 (b), dealing with activities that did not normally entail risk but that nonetheless caused harm. Her delegation strongly endorsed article 5, concerning the duty to pay compensation, on the understanding that it applied to the environment. The dispute settlement mechanisms needed to be reinforced, and a clearer distinction needed to be made between situations that entailed strict liability and those that involved responsibility.

67. As to the question of State succession and its impact on the nationality of natural and legal persons, her delegation agreed that the nationality of natural persons should be dealt with separately from that of legal persons, and that the draft articles on the topic could take the form of a General Assembly resolution. With regard to the issue of reservations to treaties, she said that while there was no need to alter the principles enshrined in the relevant conventions, greater clarity was urgently needed. There should be only one regime for reservations, and it should include the doctrine of permissibility, so that reservations which were incompatible with the purpose of the treaty were immediately impermissible.

68. Turning to the subject of the Commission's long-term programme of work, she said that her delegation attached most importance to the items relating to unilateral acts of States, criteria for the recognition of States, Governments and territorial acquisitions, the law of the environment and the law of the sea, the last-mentioned being an area in which Portugal had shown a strong interest. Her delegation welcomed the proposal to carry out a preliminary study on the ownership and protection of wrecks beyond the limits of national maritime jurisdiction.

69. The forthcoming fiftieth anniversary of the Commission was an appropriate time to re-examine its methods of work and its relationship with other bodies. Her delegation favoured the use of shorter, more structured reports which, like the various questionnaires and reports of the special rapporteurs, should be circulated well in advance of the session. It believed that a 10-week session, split into two parts, would permit better attendance by Commission members,

facilitate the structuring of the Commission's work and encourage closer cooperation with delegations. Portugal was also in favour of delegations' legal counsellors attending some working group meetings. It strongly supported the more extensive use of working groups and the establishment of a permanent group of experts, to be elected by the members of the Commission. Her delegation would support the revision of the Commission's statute along those lines.

70. Mrs. MEKHEMAR (Egypt), speaking on chapter III of the Commission's report (A/51/10 and Corr. 1), on State responsibility, said that extreme caution should be exercised in dealing with the question of countermeasures, whose use should be controlled with a view to avoiding abuse by the injured State, particularly bearing in mind the differing resources and capabilities of States. It was also essential to ensure that the wrongdoing State did not take retaliatory measures, which would escalate the dispute. In that connection, her delegation believed that the provision on proportionality contained in article 49 of the draft articles on State responsibility was too general and therefore required further consideration. It also felt that the interim measures referred to in draft article 48, paragraph 1, should be defined in order to ensure that they remained distinct from countermeasures. The conditions for the adoption of interim measures should also be specified, as the absence of any form of control was unacceptable. She supported the linkage between countermeasures and the settlement of disputes; by taking a countermeasure, a State was indicating its prior consent to seeking a peaceful settlement. She therefore disagreed with the view that the provision whereby only the wrongdoing State could refer a dispute to arbitration was in breach of the rule which required the mutual consent of both parties to arbitration. The linkage between the two issues, however, should be deliberated further.

71. Draft article 19 contained no clear definition of an international crime. Moreover, it was not apparent whether the examples cited in article 19, paragraph 3, were exhaustive. While the responsibility arising out of a serious breach differed from that arising out of a less serious breach, the crucial issue was the nature of the obligation which had been breached. Draft article 19, however, did not specify the basis on which an obligation was deemed essential for the protection of fundamental interests of the international community. In her view, the criterion should be whether or not the breach violated a mandatory provision of international law. However, the problem of defining an international crime and an international delict still remained and was attributable to the choice of inappropriate terminology which had been borrowed from internal law. Further work was therefore required with a view to achieving a widely acceptable draft.

72. Turning to chapter V of the Commission's report on international liability for injurious consequences arising out of acts not prohibited by international law, she said that it would be difficult to achieve a universal legal system which covered liability and compensation for harm arising out of acts which were unspecified, particularly in view of the variety of activities and harm that were potentially involved. In that light, the emerging tendency, which she supported, was to deal with the subject according to the nature of the activity concerned. She therefore believed that the most suitable approach would be to formulate a non-binding declaration in line with current developments in international law that could serve as a guideline, whereas individual activities

could be the subject of special agreements. The declaration should also include guidelines for compensation. Her delegation agreed partially with the content of chapter III of the draft articles on the subject; while it was valid to assume that the affected State would seek remedy on behalf of its citizens in the case of wide-scale harm, the same did not apply where harm was limited. It disagreed, however, that relief should be sought through the courts of the State of origin, as practical and legal problems would result from the divergence of legal systems. She agreed with the content of draft article 21 concerning the nature and extent of compensation or other relief, although it should likewise be restricted to wide-scale harm or harm relating to the property, natural resources or environment of the affected State. She disagreed, however, with the factors stipulated in the article on the ground that a clear distinction should be made between State responsibility and the responsibility of the individual who carried out the activity concerned. Full or partial exemption should therefore be possible in exceptional circumstances, such as war or natural disaster.

73. She was in favour of the subjects chosen for future discussion, particularly diplomatic protection and unilateral acts of States. For practical reasons, she also endorsed the idea of dividing the work of the Committee into two sessions.

The meeting rose at 6.15 p.m.